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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1985

NO.

CHARLES J. ALLEN,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioner, Charles J. Allen, prays that a Writ of Certiorari be issued to review the final Order of the Supreme Court of Pennsylvania which remanded the case for trial on the charges of simple assault, criminal trespass and rape.

QUESTION PRESENTED FOR REVIEW

Whether the United States Constitutional Guaranties, Pennsylvania Statutory Law and Case Law against double jeopardy prohibit criminal prosecution for rape, simple assault and criminal trespass after the defendant had already been convicted, jailed and fined for indirect criminal contempt of an Order of Court pursuant to the Pennsylvania Protection From Abuse Act, (35 P.S. 10181, et seq.) all of which was based upon the same conduct or episode?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the United States Supreme Court is contained in the caption of the case.

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I. OPINIONS BELOW

The Order of the Pennsylvania Supreme Court dated September 21, 1984, unreported, to date, appears at Appendix "A". The Opinion of the Pennsylvania Superior Court is reported at 469 A2d 1063 and appears at Appendix "B". The Opinion of the Court of Common Pleas of Lebanon County, Pennsylvania, Criminal Division, Action No. 328 of 1980, dated October 8, 1980, unreported, appears at Appendix "C".

II. STATEMENT OF JURISDICTION

The Order of the Pennsylvania Supreme Court sought to be reviewed was entered and filed on December 21, 1984. See Appendix "A", infra. Jurisdiction of this Court to review the Final Order of the Pennsylvania Supreme Court is conferred pursuant to 28 U.S.C. Section 1257(3).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States - Amendment V:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Constitution of the United States - Amendment XIV, Section 1:

> ". . . Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

Constitution of Pennsylvania - Article I, Section 10:

". . . No person shall, for the same offense, be twice put in jeopardy of life or limb." See, Purdons Pennsylvania Statutes Annotated, Constitution, Article I.

Statute of Pennsylvania - 18 Pa.C.S.A., Section 110, 1972, Dec. 6, P.L. 1482, No. 334, Section 1, effective June 6, 1973:

"Section 110. When Prosecution Barred By Former Prosecution For Different Offense.

Although a prosecution is for a violation of a different provision of the Statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

1. The former prosecution resulted in an acquittal or in a conviction as defined in Section 109 of this Title . . . and the subsequent prosecution is for:

a. Any offense of which the defendant could have been convicted on the first prosecution;

b. Any offense based on the same conduct or arising from the same criminal episode, of such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and was within the jurisdiction of a single Court, unless the Court

ordered a separate trial of the charge of such offense; or . . ."

Statute of Pennsylvania, 35 P.S. Section 10184, as amended, 1978, June 23rd, P.L. 513, No. 81, Section 1 - Attached as Appendix "D".

IV. STATEMENT OF THE CASE

On April 18, 1980, the Court of Common Pleas of Lebanon County, Walter, Judge, entered an Order pursuant to the Pennsylvania Protection From Abuse Act, 35 P.S. Section 10181, et seq., enjoining the petitioner herein from physically abusing, harassing or striking his wife (Protection From Abuse Act, 35 P.S. Section 10181, et seq.) (R.2a). Thereafter it was alleged that the appellant had violated the Protection From Abuse Order by forcably entering his wife's residence and physically abusing her on May 7th and/or May 8th, 1980.

As a result of these allegations, the petitioner was arraigned on indirect criminal contempt charges on

May 19, 1980. Unable to post bail in the amount set by the Court, the petitioner remained in jail until the date of the Contempt Hearing, on May 28, 1980.

At the May 28, 1980, Hearing, the petitioner was convicted of indirect criminal contempt and fined Seven Hundred Fifty Dollars ($750.00) plus costs, in that ". . . He physically abused his wife by attempting to cause or intentionally, knowingly and recklessly causing bodily injury to her in the late evening hours of May 7th, or early morning hours of May 8th, or both . . ." (R.7a). The testimony at the May 28, 1980, Contempt Hearing further alleged that the appellant had forcibly compelled his wife to engage in sexual intercourse on May 7th and/or May 8th, 1980.

Prior to the initiation of the contempt proceedings, on May 16, 1980, a Criminal Complaint was filed against the petitioner for simple assault and criminal trespass. It should be noted at the May 19, 1980, arraignment on criminal contempt charges for violation of the Protection From Abuse Order the petitioner's wife, the prosecutrix, was represented by the Assistant District Attorney of Lebanon County.

Furthermore, on June 3, 1980, a second Criminal Complaint was filed against the appellant for rape.

It has been stipulated by the Commonwealth that all criminal charges filed in the two (2) Complaints arose out of the same conduct or episode for which the petitioner was charged,

incarcerated, convicted and fined for criminal contempt (R.17a-18a).

After Preliminary Hearings, the appellant was held for Court on charges of simple assault, criminal trespass and rape. Thereafter an information was returned against the petitioner on theses charges.

The Petitioner filed an Omnibus Pretrial Motion composed of a Motion To Quash the information and a Motion for a Continuance. The Motion To Quash the information alleged that to try the appellant on the criminal charges brought in the two Complaints after his conviction of criminal contempt of Court for the same acts placed the petitioner in double jeopardy for the same offense.

The Common Pleas Court below disagreed and by its Order of October 8, 1980, dismissed the Petitioner's Omnibus Pretrial Motion. It is from that Order that the petitioner appealed to the Superior Court of Pennsylvania.

On November 25, 1983, the Superior Court entered a judgment dismissing the charge of simple assault and remanded the case for proceedings consistent with the opinion on the criminal trespass and rape charges.

It is from that Order that the petitioner appealed to the Supreme Court of Pennsylvania. On December 21, 1984, the Supreme Court of Pennsylvania reversed in part the Order of the Superior Court and affirmed in part the Order of the Superior Court. The

Pennsylvania Supreme Court remanded the case for trial on all charges consisting of simple assault, criminal trespass and rape. It is from that Order of the Pennsylvania Supreme Court that the within Petition For Writ Of Certiorari has been filed.

V. ARGUMENT

It is important to note at the outset that the Pennsylvania Supreme Court, a State Court of last resort, has decided a Federal question concerning the Fifth Amendment of the United States Constitution, more particularly the double jeopardy clause, in a way which conflicts with the decision of another State Court of last resort. The petitioner refers the Honorable Supreme Court of the United States to the decision of the Illinois Supreme Court in People v. Gray, 69 Ill. 2d 44, 370 Ne. 2d 797 (1977), cert. denied sub. nom., Illinois v. Gray, 435 U.S. 1013 (1978). On the almost identical set of facts the Illinois Supreme Court decided that there was a Constitutional violation of

the Fifth Amendment double jeopardy clause. The question herein presented, concerning the Fifth Amendment of the United States Constitution, is an important question of Federal law which has not been addressed by the Honorable Supreme Court of the United States and which should be addressed and settled by the Honorable Supreme Court of the United States.

The principle that a person should not be placed twice in jeopardy for the same offense is fundamental to the criminal justice system of the United States and the Commonwealth of Pennsylvania. The General Assembly of the Commonwealth of Pennsylvania at 18 Pa.C.S.A. Section 110 and the Pennsylvania Supreme Court in Commonwealth v. Campana, 455 Pa. 622,

314 A2d 854 (1974), cert. denied, 417 U.S. 969 (1974) have recognized these Constitutional principles.

The United States Supreme Court in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.E.D. 2d 707 (1969), applied Federal Constitutional Standards of double jeopardy to the States through the due process clause of the Fourteenth Amendment, making the Fifth Amendment clearly applicable to the case at bar.

The Supreme Court of the United States, in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.E.D. 2d 656 (1969) has held that the Constitutional guarantees against double jeopardy apply to three (3) distinct situations: second

prosecution after acquittal (autrefois acquit), second prosecution after conviction (autrefois convict), and multiple punishments for the same offense.

The petitioner herein was imprisoned, fined and convicted for indirect criminal contempt of Court for certain acts he allegedly committed on May 7th and May 8th, 1980, which acts were held to violate the Protection From Abuse Order entered on April 18, 1980. The question thus becomes whether subjecting the petitioner to additional criminal charges arising out the incident of May 7th and/or May 8th, 1980, after a criminal contempt conviction for the same conduct, is proscribed by the Constitutional protections against double jeopardy and

the long recognized common law principle of autrefois convict.

This exact question was addressed by the Supreme Court of Illinois in the case of People v. Gray, 69 Ill. 2d 44, 370 Ne. 2d 797 (1977), cert. denied sub. nom.

Factually speaking Gray is on all fours with the case at bar. The defendant there was enjoined by a Protective Order from molesting his wife. The Protective Order was issued in a divorce action pursuant to an Illinois Statute quite similar to the Pennsylvania's Protection From Abuse Act. Gray subsequently entered his wife's home, struck her and shot her. After a Hearing, the Trial Court found him in willful contempt and sentenced

him to six (6) months in prison. Thereafter, Gray was charged with aggravated battery and attempted murder based upon the same conduct or episode for which he was found to be in contempt.

Gray moved to dismiss based upon double jeopardy grounds, thus raising the same question raised in the case at bar. The Illinois Supreme Court held that the offense of contempt and the subsequent criminal offenses constituted the same offense and, therefore, found a violation of the double jeopardy provisions of the United States Constitution.

The Illinois Court, as the Pennsylvania Supreme Court in the case at bar, applied the case of Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180, 76

L.E.D. 306 (1932) to determine whether the offenses were identical for double jeopardy purposes. Simply stated, the test is whether "each requires proof of a fact which the other does not".

The Gray Court pointed out that the application of this test involved the "same evidence" test. The Court, at 370 Ne. 2d at 800 stated:

> "To subject a person to multiple successive prosecutions because of differences in detail and in proofs undermines the fundamental basis of the double jeopardy law. Considerations of fairness and finality, the very foundation of the double jeopardy bar, require a nontechnical evaluation of the "same evidence"

test and focus upon the similarity of the elements involved in the two proceedings . . . Here an application of the same evidence test makes manifest that defendant was prosecuted and punished twice for the same offense. He was tried and held in indirect criminal contempt of court as well as punished for striking and shooting his wife. Subsequently he was tried and convicted of aggravated battery and acquitted of the crime of attempted murder <u>for the same conduct</u> . . . Notwithstanding defendant's conviction and punishment for criminal contempt, he was tried and convicted a second time <u>for the same conduct</u>, striking and shooting his wife, in a

criminal proceeding. The finding of criminal contempt and the conviction of aggravated battery constitute double trial and double punishment for the same offense." (emphasis added)

The facts of Gray and those of the case at bar are indistinguishable. Gray and the petitioner were both found in indirect criminal contempt for violating an Order of Court enjoining them from striking or molesting their wives as a result of various domestic problems. Criminal charges were subsequently filed against Gray and the petitioner based upon the same conduct for which they were found in contempt. Applying the "same evidence" test to both Gray and the instant case, it is obvious that the petitioner is subject

to prosecution and punishment twice for the same offense.

What was required to prove that the petitioner violated the April 18, 1980, Protection From Abuse Order and thus prove him in indirect contempt of Court? That the appellant entered his wife's residence, physically struck and assaulted her, and forced her to submit to his sexual demands.

What would be required to convict the appellant of simple assault, criminal trespass and rape? The same elements - unlawful entry, physical contact with the wife, and forcible compulsion to have sexual relations.

Neither events require proof of an element not required by the other. "To

subject a person to multiple successive prosecutions because of differences in detail and proofs undermines the fundamental basis of the double jeopardy law." People v. Gray, supra. 370 Ne. 2d at 800.

Additionally, the case of Cipola v. Cipola, 264 Pa. Super. 53, 398 A2d 1053 (1979) provides guidance. In Cipola a defendant was charged with indirect criminal contempt for violating a Protection From Abuse Order. The Trial Court found the defendant not to be in contempt. The appellant, the defendant's wife, appealed to the Superior Court. The Superior Court quashed the appeal, holding that double jeopardy attached to indirect criminal contempt proceedings and thus a not guilty adjudication on the merits was

an absolute bar to appellate review under the Fifth Amendment of the United States Constitution.

It is submitted that if double jeopardy principles attached to a second prosecution of an acquittal of indirect criminal contempt it would certainly apply to a second prosecution after a conviction of indirect criminal contempt.

In every respect, indirect criminal contempt charges are criminal in nature and may subject a defendant to imprisonment and a fine. Commonwealth v. Charlett, _____ Pa. _____, 391 A2d 1296 (1978). Indirect criminal contempt, being in every respect a criminal offense, confers upon a defendant all of the procedural rights and safeguards afforded to all other

criminal defendants - right to bail, notification of accusations, opportunity to present a defense, right to counsel, trial by jury and so on. See Cipola v. Cipola, supra.; Commonwealth v. Charlett, supra.

As a practical matter and as it bears upon a criminal defendant, there is no distinction between indirect criminal contempt charges and any other criminal charges. Procedurally speaking, they are the same. A conviction of indirect criminal contempt is an absolute bar to a subsequent prosecution for other criminal charges arising out of the same conduct or episode.

It has long been the law that a State with all of it's power and resources should not be allowed

repeated attempts to convict an individual, thereby subjecting him to embarrassment, expense and compelling him to live in a continual state of anxiety and insecurity. (See Commonwealth v. Hude, ___ Pa. ___, 458 A2d 177, 182 (1983), quoting from Green v. United States, 355 U.S. 184-187 (1957)). Finally, it should be noted that the landmark case of Commonwealth v. Campana, 452 Pa. 237, 304 A2d 452, vacated and remanded, 414 U.S. 808 (1973), on remand, 455 Pa. 622, 314 A2d 854, cert. denied., 417 U.S. 969 (1974), bears out the double jeopardy issues raised in the case at bar. Campana left absolutely no doubt that all criminal charges arising out of the same incident must be brought in one (1) prosecution. The Pennsylvania Supreme Court in Campana expressly

barred a subsequent prosecution for any offense arising from the same criminal episode, where the offense was known to the prosecuting authorities at the time of the commencement of the first trial. (See also Commonwealth v. Holmes, 480 Pa. 536, 540, 391 A2d 1015, 1978)

In the case sub judice charges of simple assault and criminal trespass were filed on May 16, 1980. Appellant was charged with indirect criminal contempt on May 19, 1980, and convicted of indirect criminal contempt on May 28, 1980. Thereafter, rape charges were filed against the petitioner on June 3, 1980. The petitioner was fined and imprisoned for the indirect criminal contempt. Petitioner then was subjected to an adversarial proceeding to determine his criminal culpability

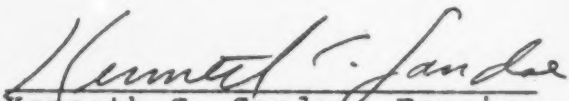
in regard to the indirect criminal contempt. At that proceeding the Commonwealth presented the testimony of the petitioner's wife and two (2) police officers and the petitioner presented his own testimony in defense. After hearing the lower Court found the petitioner guilty of contempt and fined him Seven Hundred Fifty Dollars ($750.00). After all of this, the Commonwealth brought another charge against the petitioner, arising from the same incident, namely rape.

It is particularly important to emphasize that at petitioner's preliminary arraignment, the prosecutrix, petitioner's wife, was represented by the Assistant District Attorney of Lebanon County. Clearly the Commonwealth had sufficient

knowledge to charge the petitioner before proceeding with the contempt action, and in fact did charge the petitioner with assault and criminal trespass prior to arraigning the petitioner on charges of indirect criminal contempt. The Commonwealth had an opportunity to test the strength of its case and in turn discover petitioner's defense in anticipation and/or preparation for trial on the greater charges of criminal trespass, assault and rape. The appellant will once again be subject to criminal liability and all that which goes with it including embarrassment, expense and uncertainty of his future unless the Honorable United States Supreme Court finds that a second trial for the events which occurred on May 7th and/or

May 8th, 1980, offends the double jeopardy protections of the United States Constitution.

Respectfully submitted,



Kenneth C. Sandoe, Esquire
Counsel for Petitioner

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
(Appellant at No. 65)

v.

CHARLES J. ALLEN
(Appellant at No. 64

Nos. 64 & 65 E.D. Appeal Docket 1984

Superior Court No. 2393 Philadelphia 1980

C.P. Lebanon, Criminal Division, No. 328 of 1980

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the SUPERIOR COURT, be, and the same is hereby affirmed in part and reversed in part. Case remanded for trial on the charges of simple assault, criminal trespass and rape.

BY THE COURT,

/s/ Marlene F. Lachman
Marlene F. Lachman, Esq.
Prothonotary

Dated: December 21, 1984

J#186-84
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

CHARLES J. ALLEN,
Appellant

No. 64 E.D. Appeal Docket 1984

Appeal from the Opinion of the Superior Court of Pennsylvania No. 2393, Philadelphia, 1980; and the Opinion of the Court of Common Pleas of Lebanon County, Criminal Division, Action No. 328 of 1980

____ Pa. Superior Ct. ____,
469 A.2d 1063 (1983)

ARGUED: October 25, 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

CHARLES J. ALLEN,
Appellee

No. 65 E.D. Appeal Docket 1984

Appeal from the Opinion of the Superior Court of Pennsylvania No. 2393, Philadelphia, 1980; and the Opinion of the Court of Common Pleas of Lebanon County, Criminal Division, Action No. 328 of 1980

____ Pa. Superior Ct. ____,
469 A.2d 1063 (1983)

ARGUED: October 25, 1984

OPINION OF THE COURT

HUTCHINSON, J. - FILED: December 21, 1984

These cross-appeals by allowance from an opinion and order of Superior Court require us, for the first time, to construe the provisions of the Protection from Abuse Act (Act), Act of October 7, 1976, P.L. 1090, No. 218, as amended, 35 P.S. §§10181-10190. Specifically we must determine whether principles of double jeopardy and compulsory joinder bar the prosecution of an individual for simple assault, criminal trespass and rape after that individual has been found in indirect criminal contempt for violating a court order entered pursuant to the Act. Because the Protection From Abuse Act has its roots in equity and is essentially civil, we hold that a court's use of its inherent power to enforce its orders under the Act through contempt does not preclude a later criminal prosectuion to protect

the Commonwealth's interest in preventing crime.

In this case Lebanon County Common Pleas denied Allen's pre-trial motion to dismiss the criminal charges. Superior Court affirmed in part and reversed in part. It held that on the facts of this case, the criminal contempt under the Act and the charge of simple assault involve the same elements, and therefore double jeopardy barred the simple assault prosecution. Superior Court affirmed Common Pleas' denial of Allen's double jeopardy challenges to the criminal trespass and rape charges and remanded these charges for trial. Superior Court also held that Sections 109-112 of the Crimes Code, 18 Pa.C.S. §§109-112, cited by Allen, relating to second prosecutions in various instances, did not apply to this case.

We agree with Superior Court that the cited sections of the Crimes Code

not apply, and that double jeopardy
s not bar the prosecutions for criminal
spass and rape. We disagree, however,
h Superior Court's conclusion that
prosecution for simple assault is
red by double jeopardy, and hold that
irect criminal contempt and simple
ault are separate offenses for double
pardy purposes because they sever
tinct purposes and require different
ments of proof even though they may
se out of the same course of conduct.
believe this holding is consistent
h both the facts of this case and
law of double jeopardy as developed
the United States Supreme Court, and
also faithful to the intent of the
islature in passing the Protection
m Abuse Act.

On April 9, 1980, Julianne L. Allen,
wife[1] of the defendant, filed a
tition Pursuant to the Protection
m Abuse Act" seeking a protective

order under Section 10186 of the Act. Following a hearing, Lebanon County Common Pleas Court entered an order which provided, inter alia, that defendant was ". . . enjoined and ordered to refrain from physically abusing, striking or harassing petitioner, Julianne L. Allen, and their minor children from this time forward and for the duration of this order." R.R. 3a.[2]

Subsequently, petitioner alleged that on the night of May 7-8, 1980, defendant violated the order by forcibly entering her residence[3] and physically abusing her. On May 16, Jonestown Borough Police, acting on information provided by petitioner, filed a criminal complaint against defendant on charges of simple assault and trespass. On May 19, petitioner requested that defendant be charged with contempt, pursuant to Section 10190 of the Act.[4] Defendant was arraigned on the contempt charge and, failing to

st bail, remained in Lebanon County ison until May 28, the date of the ntempt hearing.[5] After the hearing, which both petitioner and defendant esented evidence, the court found fendant in contempt of the April 18 der. The court ordered defendant to y a fine of $750.00 and costs, and scharged him from prison.

On June 3, 1980, the Jonestown Borough lice filed anotner criminal complaint ainst defendant for raping his wife May 7-8. All three criminal charges re consolidated for preliminary hearing d trial. Defendant filed an Omnibus etrial Motion to Quash the three criminal formations on the grounds that osecution of these charges was barred double jeopardy. Lebanon County Common eas en banc denied the motion. Defendant led a timely appeal to Superior Court, ich affirmed the trial court on the iminal trespass and rape charges, but

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rsed on the simple assault charge.

We granted both parties' petitions allowance of appeal. The Commonwealth ends that Superior Court erred in issing the simple assault charge, e Allen contends that Superior Court d in holding that the criminal trespass rape charges were not barred by double ardy.

Initially, we agree with Superior t that Sections 109-112 of the Crimes 18 Pa.C.S. §§109-112, barring ecutions in various circumstances,[6] the "compulsory joinder rule" of nwealth v. Campana, 452 Pa. 233, A.2d 432, vacated and remanded, 414 808 (1973) (Campana I), on remand, Pa. 622, 314 A.2d 854, cert. denied, U.S. 969 (1974) (Campana II), do apply in this case. This inquiry necessary because, as we recently ed:

> It is . . . appropriate to begin our . . . inquiry by determining the applicability of section 110 to the . . . facts. In so proceeding, we are mindful that if the provisions of section 110 are satisfied, there will have also been compliance with the requirement as set forth under the Campana rule. The necessity to consider the double jeopardy complaints will only arise if it is determined that the statutory provision does not require the grant of the relief requested.

Commonwealth v. Hude, 500 Pa. 482; 489, 458 A.2d 177, 180 (1983) (emphasis added).[7]

In Hude, the identity between Section 110 and the Campana II rule was further demonstrated in these terms:

> This Court's decisions in Campana I and Campana II ultimately designed a rule of compulsory joinder which required the criminal offenses arising from the same criminal episode to be disposed of in one prosecution. Commonwealth v. Beatty, 500 Pa. 284, 455 A.2d 1194 (1983). In the interim between Campana I and Campana II, the legislature promulgated section 110 which set forth when prosecution would be barred by former prosecution for a different offense.
>
> While this Court in its Campana decisions spoke in terms of the obligation to join offenses, and the legislature in section 110 provided a bar of prosecution where joinder had not occurred, it is evident that our Court rule was

in harmony with section 110. See Commonwealth v. Beatty, supra; . . .

> The compulsory joinder rule set forth in Campana I and II and the provisions of section 110 were designed to serve two distinct policy consideratins: (1) to protect a person accused of crimes from governmental harassment of being forced to undergo successive trials for offenses stemming from the same criminal episode; and (2) as a matter of judicial administration and economy, to assure finality without unduly burdening the judicial process by repetitious litigation.

Id. at 487-489, 458 A.2d at 179-180 (footnotes and citations omitted).

While the provisions of Part I of Title 18 are generally applicable to offenses defined by Title 18, Section 107 clearly excepts criminal contempt from the requirements of Sections 109-112:

> §107. Application of preliminary provisions.
>
> (a) General rule.--The provisions of Part I of this title (relating to preliminary provisions) are applicable to offenses defined by this title or by any other statute.
>
> . . . .
>
> (c) Exceptions.--This section does not affect the power of a court

> to declare forfeitures or to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree, nor does it bar, suspend, or otherwise affect any right of liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action or matter constitutes an offense defined in this title.

18 Pa.C.S. §107. Thus, Section 110's prohibition against a second prosecution after a previous prosecution for another crime is inapplicable to this case, where the former "crime" is criminal contempt. Moreover, Section 107 provides not only for contempt in general, but also for "any sanction authorized by law." Such a sanction appears specifically in Section 10190 of the Protection From Abuse Act. Because Section 110 does not apply, neither do the requirements set forth in our Campana II decision. See Hude, supra; Beatty, supra.

Requiring joinder of the contempt charge with criminal charges to which

the facts may give rise would not advance the policies underlying Campana and Section 110, but would do positive harm to the utility of the Protection From Abuse Act. Government harassment would not be avoided, because the contempt proceeding is privately triggered by the person in whose favor the order was entered, i.e., the abused spouse or children. The governmental authorities are not necessarily involved in bringing the contempt proceeding; indeed, they may not even be aware that it is brought. They therefore have no real control over that proceeding and should not be prevented by it from protecting the Commonwealth's interest against violations of criminal law. Similarly, judicial economy would not be served by requiring joinder. To require joinder in such circumstances would not be in accord with the ratio decidendi of Commonwealth v. Beatty, supra. See also the concurring opinion

of Mr. Justice Flaherty, joined by Mr. Justice Hutchinson. Moreover, even if the court had knowledge of the two proceedings, it would then either have to postpone the contempt hearing or artificially accelerate the criminal charges. Such procedures would benefit neither party and would decrease, not increase, effective judicial administration.

A joinder requirement would also fail to serve the legislature's intent in passing the Protection From Abuse Act. As the Commonwealth points out, and as amici eloquently and abundantly illustrate, domestic violence and spousal and child abuse are serious and widespread societal problems which are effectively beyond reach, absent such legislation. The abused spouse's ability to promptly seek enforcement of injunctions against violence under the Act is important to its functioning.

The inapplicability of Crimes Code Section 110 to this Act, however, requires us to set out our view on the specifics of the double jeopardy issue. The United States Supreme Court most recently addressed these issues in Missouri v. Hunter, 459 U.S. 359 (1983) and Ohio v. Johnson, ___ U.S. ___, 81 L.Ed.2d 425 (1984). Both cases reaffirmed two fundamental points of double jeopardy analysis. The first is that the Double Jeopardy Clause of the Fifth Amendment

> protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Brown v. Ohio, 432 US 161, 165, 53 L Ed 2d 187, 97 S Ct 2221 (1977), quoting North Carolina v. Pearce, 395 US 711, 717, 23 L Ed 2d 656, 89 S Ct 2027 (1969).

Ohio v. Johnson, ___ U.S. ___, ___, 81 L.Ed.2d 425, 433 (1984). The second fundamental point those cases reaffirm is that in considering whether the protections against second prosecutions

or multiple punishments for the same offense have been violated, the test of Blockburger v. United States, 284 U.S. 299 (1932), remains vital:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304. See also Illinois v. Vitale, 447 U.S. 410 (1980). Missouri v. Hunter also made clear, however, that the rule of statutory construction set forth in Blockburger, and reaffirmed in Whalen v. United States, 445 U.S. 684 (1980), must also be considered:

> "The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense', they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." 445 US, at 691-692, 63 L Ed 2d 715, 100 S Ct 1432 (emphasis added).

We went on to emphasize the

qualification on that rule:

> "[W]here the offenses are the same . . . cumulative sentences are not permitted, unless elsewhere specially authorized by Congress." Id., at 693, 63 L Ed 2d 715, 100 S Ct 1432 (emphasis added).

Missouri v. Hunter, 459 U.S. 359, 366-367 (1983) (emphasis in original).

With these principles in mind, we proceed to the specific offenses in this case. The double jeopardy protection here is protection against a second prosecution for the same offense after conviction (autrefois convict). Defendant alleges that his conviction for contempt bars the subsequent criminal prosecutions. We must, therefore, first determine whether the contempt proceeding was criminal in nature.

The Commonwealth argues it is not. On that point we must disagree.[8]

Plainly, the contempt involved in this case was indirect criminal contempt. The contempt was criminal in nature because

it was used to protect both the dignity and authority of the court and the interest of the general public. Commonwealth v. Charlett, 481 Pa. 22, 391 A.2d 1296 (1978). The contempt was indirect because it did not occur in the actual presence of the court, or directly affect a proceeding then in progress. Commonwealth v. Maurizio, 496 Pa. 584, 437 A.2d 1195 (1981). Indeed, the Protection From Abuse Act stipulates that violators of orders entered pursuant to the Act may be held in indirect criminal contempt. 35 P.S. §10190. Thus, the finding of contempt involved a proceeding which was criminal in nature, and is thus a proceeding with implications for double jeopardy analysis.

However, applying the tests enunciated by the United States Supreme Court, it is evident that the charges of rape and criminal trespass are not barred by double jeopardy because they both involve proof

of a fact which the finding of contempt does not. Rape[9] requires proof of "sexual intercourse with another person not his spouse" by forcible compulsion or threat thereof. Criminal trespass[10] requires that a person, "knowing that he is not licensed or privileged to do so," enters or remains in a building by subterfuge or breaks into any building or occupied structure. The finding of indirect criminal contempt in this case involved knowledge of the court's order under the Act and wilful disobedience of that order. Rape and criminal trespass thus are not merely separate offenses in one particular or other, but are wholly different offenses from indirect criminal contempt. Superior Court was, therefore, clearly correct in holding that double jeopardy did not bar prosecution of defendant on these charges.

There remains the charge of simple assault. Superior Court, relying on

People v. Gray, 69 Ill.2d 44, 370 NE.2d 797 (1977), cert. denied sub nom. Illinois v. Gray, 435 U.S. 1013 (1978),[11] held that the criminal contempt and the charge of simple assault involved the same elements, thus barring the prosecution for simple assault. Despite the thoughtful opinion of Judge McEwen, we note that not all jurisdictions have reached the same result as Illinois and Superior Court on this point.[12]

We find the dissent in Gray persuasive. That dissent, which is echoed in the trial court's opinion in this case, succinctly states the distinct elements of criminal contempt and the important functions which they serve.

> In the case at bar, . . . the contempt conviction only held that the defendant had wilfully committed certain acts[13] which violated the court order. The court order could have been violated by an otherwise legal act.
>
> The significance of the criminal contempt element of wilful disobedience becomes more apparent

when the respective purposes of contempt and ordinary criminal offenses are considered. The element of wilful disobedience is not a mere formal requirement, but is directly related to the stated purpose of criminal contempt proceedings--protecting the dignity of the judiciary: "Criminal contempt is conduct which is directed against the dignity and authority of the court or a judge acting judicially * * *." . . . "Criminal contempt consists of acts tending to lessen the dignity or impede the process of the court, and such proceedings are instituted to vindicate the authority of the court." . . . While it has been suggested that the role of both criminal contempt and ordinary criminal offenses is to protect the institutions of government and the enforcement of their mandates . . . it is my belief that contempt retains its distinctive function in specifically protecting our judicial system from abuse. Thus, I believe that the additional element of wilful disobedience in this case is neither immaterial nor insubstantial in distinguishing criminal contempt from ordinary offenses.

. . . .

The necessity of criminal contempt as a tool for deterring abuse of the judiciary demands that a judge not be required to consider the consequences of foreclosing subsequent criminal prosecutions. As the People note in their brief, the majority holding, in effect, gives the trial judge the power to decide whether a contumacious party will be charged

> with a criminal offense, thus usurping the function of the State's Attorney. It might also be noted that in most cases of a violation of a court order, the criminal contempt is really initiated or prosecuted by the aggrieved party; the contempt is not prosecuted in the name of the People and the State's Attorney is not even notified or aware of the proceedings.

People v. Gray, supra, 69 Ill.2d 44, 57-59, 370 NE.2d 797, 802-803 (Ryan, J., dissenting) (footnote added). See also Commonwealth v. Gallarelli, 372 Mass. 573, 362 NE.2d 923 (1977) (contempt finding not a bar to prosecution for interference with administration of justice and conspiracy to influence a jury when charges arose from the same incident).

Thus in the present case, the indirect criminal contempt proceeding involves elements not necessary to a finding of simple assault,[14] even though assaultive behavior was involved in the contempt. Defendant could have wilfully violated the court order by any number of actions, many of which would not have involved

assault, or even physical contact or presence. Moreover, the contempt order's purpose was protection of the court's dignity and enforcement of its order, not punishment for criminal assault. Commonwealth v. Beatty, supra, concurring opinion by Mr. Justice Flaherty, joined by Mr. Justice Hutchinson. See also Commonwealth v. Norris, 498 Pa. 308, 447 A.2d 246 (1982) (imposition of separate though concurrent sentences for rape and corruption of a minor did not violate double jeopardy or the "same offense" doctrine). We hold, therefore, that under the Blockburger test, indirect criminal contempt and simple assault do contain the requisite "separate elements" and vindicate different interests. Therefore, prosecution on the substantive criminal charge after a finding of contempt in violating the injunction against abuse does not violate double jeopardy.

To hold criminal prosecutions barred

by a finding of indirect criminal contempt would either gravely impair the Commonwealth's interest in punishing crime or severely restrict the practical utility of the Protection From Abuse Act. Advance prevention of physical and sexual abuse is the primary goal of the legislature in passing the Abuse Act. To preclude subsequent prosecutions for assault (or rape or sexual abuse of children) after a finding of contempt would encourage abusive persons to continue violent criminal actions against their spouses or children without risking any penalty more severe than the six months the Act provides for contempt. In the alternative, victims, courts and prosecutors would be forced to forego the only sanction against violation of orders under the Protection From Abuse Act - its contempt provisions - in order to punish an assaultive spouse.

Such results were anticipated over

a decade ago by the Federal District Court for the Southern District of New York. In United States v. Mirra, 220 F.Supp. 361 (S.D.N.Y. 1963), Mirra was summarily found in contempt for throwing a chair at the prosecutor. In his subsequent prosecution for assault on a Federal officer, he pleaded the contempt conviction as a bar under double jeopardy. The court replied to this theory in the following terms:

> Let us consider by way of illustration the consequences of upholding Mirra's claim in the context of an extreme but not wholly improbable case that could have arisen after, and out of, Mirra's contempt conviction. Assume that Mirra's projectile had received more accurate a propulsion and had scored on its intended target-the Assistant United States Attorney. And assume further the grisly and morbid fact that the Assistant United States Attorney had sustained an injury which ultimately proved fatal. To sustain Mirra's claim would, in effect, grant a summary contemnor immunity from a homicide prosecution-an unconscionable result. Merely to state the case suffices to reveal what must preforce be the answer to Mirra's theory.

Id. at 366. We hold that the same implied answer, no double jeopardy, is required in this case.

Order of Superior Court affirmed in part and reversed in part. Case remanded for trial on the charges of simple assault, criminal trespass, and rape.

Mr. Justice Larsen joins this opinion and files a concurring opinion.

Mr. Chief Justice Nix concurs in the result.

Mr. Justice Zappala concurs in the result.

Footnotes:

1 The parties, although living separately at the time the petition was filed, were still married at that time. They were divorced in 1981.

2 Such relief is provided for by Section 10186(a)(1), which provides that the Court of Common Pleas "shall be empowered to grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children, which may include: . . . [d]irecting the defendant to refrain from abusing the plaintiff or minor

children."

3 This residence was not the former residence of the family, but a new residence to which petitioner had moved following entry of the order.

4 Section 10190 provides, in relevant part:

> §10190. Contempt
>
> (a) Upon violation of a protection order or a court approved consent agreement the court may hold the defendant in indirect criminal contempt and punish him in accordance with law.
>
> (b) Notwithstanding any provision of the law to the contrary any sentence for this contempt may include imprisonment up to six months or a fine not to exceed $1,000 or both and the defendant shall not have a right to a jury trial on such a charge.

35 P.S. §10190 (Supp. 1984-85).

5 The hearing was conducted pursuant to Section 10185 of the Act, which provides, in relevant part:

> §10185. Hearings
>
> (a) Within ten days of the filing of a petition under this act a hearing shall be held at which the plaintiff must prove the allegation of abuse by a preponderance of the evidence. The court shall advise the defendant of his right to be represented by counsel.
> (b) The court may enter such temporary orders as it deems necessary

to protect the plaintiff or minor children from abuse, upon good cause shown in an ex parte proceeding. Immediate and present danger of abuse to the plaintiff or minor children shall constitute good cause for purposes of this section.

6 Section 109 addresses prosecutions barred by a former prosecution for the same offense; Section 110 sets forth conditions when a prosecution is barred by a former prosecution for a different offense; Section 111 describes the situation when a prosecution would be barred by a former prosecution in a foreign jurisdiction; and Section 112 provides qualifications on Sections 109-111 where the former prosecution was before a court lacking personal or subject matter jurisdiction, was procured fraudulently by the defendant, or where the proceeding which produced the conviction was ultimately held invalid.

7 Manifestly, only Section 110 has even arguable applicability to this case, since defendant's argument is that the criminal contempt prosecution bars prosecution for the criminal trespass, simple assault and rape charges, and Sections 109, 111 and 112 are inapplicable to the facts of this case.

8 Of course, if jeopardy did not attach to the contempt proceeding, no constitutional protections would be implicated and our inquiry would be at an end.

9 18 Pa.C.S. §3121.

10 18 Pa.C.S. §3503.

[11] In this regard, we note that defendant's assertion that the United States Supreme Court's denial of certiorari in Gray amounted to "giving its approval to the Supreme Court of Illinois' decision," Brief for Appellant Allen at 12, is clearly erroneous. See Shaw v. Delta Air Lines, Inc., ___ U.S. ___, ___ n. 11, 77 L.Ed.2d 490, 499, n. 11 (1983).

[12] See Annot. 26 A.L.R.4th 950 (1983).

[13] So too in the present case, where the order entered by Common Pleas could have been violated by vandalism against petitioner's property or harassing telephone calls.

[14] 18 Pa.C.S. §2701. The statute defines simple assault as follows:

> (a) Offense defined.--A person is guilty of assault if he:
>
> (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) negligently causes bodily injury to another with a deadly weapon; or
>
> (3) attempts by physical menace to put another in fear of imminent serious bodily injury.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

CHARLES J. ALLEN,
Appellant

No. 64 E.D. Appeal Docket 1984

Appeal from the Opinion of the Superior Court of Pennsylvania No. 2393, Philadelphia, 1980; and the Opinion of the Court of Common Pleas of Lebanon County, Criminal Division, Action No. 328 of 1980

___ Pa. Superior Ct. ___,
469 A.2d 1063 (1983)

ARGUED: October 25, 1984

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

CHARLES J. ALLEN,
Appellee

No. 65 E.D. Appeal Docket 1984

Appeal from the Opinion of the Superior Court of Pennsylvania No. 2393, Philadelphia, 1980; and the Opinion of the Court of Common Pleas of Lebanon County, Criminal Division, Action No. 328 of 1980.

___ Pa. Superior Ct. ___,
469 A.2d 1063 (1983)

ARGUED: October 25, 1984

CONCURRING OPINION

JUSTICE ROLF LARSEN

FILED: December 21, 1984

I join the majority opinion. I write separately to emphasize that the contempt provisions of the Protection From Abuse Act[1] are available and intended not only to punish an abusive spouse for past abusive behavior, but are also available and intended to physically restrain (i.e., jail) an abusive spouse in order to prevent future occurrences of abuse. There is much peace of mind in knowing that the abuser cannot reach the object of the abuse.

Additionally, I note that the General Assembly has clearly expressed its intention that the rights and remedies set forth in the Protection From Abuse Act are supplementary to an abuse victim's civil or criminal remedies. Section 10189 of the Act, 35 P.S. §10189, provides:

> Unless otherwise indicated in this act, any proceeding under this act shall be in accordance with the Rules of Civil Procedure and shall be in addition to any other available civil or criminal remedies.

It is obvious, therefore, that requiring joinder of contempt charges for violation of a court order under the Act with criminal charges arising from the abusive conduct that constitutes that violation would contravene the explicit mandate of the legislature and thwart its salutary goals.

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[1] Act of October 7, 1976, P.L. 1090, No. 218, as amended, 35 P.S. §§10180-10190.

J. 2101/81 (42)

IN THE SUPERIOR COURT OF PENNSYLVANIA
NO. 2392 Philadelphia, 1980

COMMONWEALTH OF PENNSYLVANIA

v.

CHARLES J. ALLEN, Appellant

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the Court of Common Pleas of Lebanon County be, and the same is hereby reversed in part and affirmed in part. The charge of simple assault is dismissed. Case remanded for proceedings consistent with this opinion on the criminal trespass and rape charges. Jurisdiction is relinquished.

BY THE COURT,

J. Haniel Henry
Prothonotary

Dated: November 25, 1983

IN THE SUPERIOR COURT OF PENNSYLVANIA
NO. 2392 Philadelphia, 1980

COMMONWEALTH OF PENNSYLVANIA

v.

CHARLES J. ALLEN, Appellant

Appeal from the Order of the Court of Common Pleas of Lebanon County, Criminal, No. 328 of 1980.

BEFORE: CERCONE, P. J., McEWEN and HOFFMAN, JJ.

OPINION BY McEWEN, J. :

This is an appeal from an order which denied the omnibus pre-trial motion of appellant wherein appellant had argued that prosecution on charges of criminal trespass,[1] simple assault[2] and rape[3] was barred on double jeopardy grounds.[4] We here consider where a finding that appellant was in contempt of an order issued pursuant to the Protection From Abuse Act[5] bars subsequent prosecution on charges based

on the same conduct which supported the contempt order.

The distinguished Judge John A. Walter, by order of April 18, 1980, enjoined appellant from physically abusing, striking or harassing his wife and minor children. A criminal complaint was subsequently filed on May 16, 1980, charging appellant with simple assault and criminal trespass as a result of an allegation that appellant had forcibly entered the residence of his wife and physically abused her on May 7 and May 8, 1980. As a further result of the incident, appellant was arraigned on contempt charges on May 19, 1980. The Common Pleas Court, after a hearing on May 28, 1980, found appellant to be in contempt of court and ordered him to pay costs and a fine of $750.00. A further

criminal complaint based upon the incident was filed on June 3, 1980, and charged appellant with rape.[6]

Appellant asserts that the principle of double jeopardy bars prosecution on all three criminal charges since appellant had previously been convicted of contempt. The contentions set forth by appellant require analysis of the provisions of the Crimes Code, 18 Pa.C.S.A., as well as the double jeopardy clauses of the United States Constitution[7] and the Constitution of this Commonwealth.[8] We decide that: (1) the sections of the Crimes Code cited by appellant in support of his position are not applicable to this case; (2) the double jeopardy protection of the federal constitution bars only the simple assault charge; (3) and the

state constitutional prohibition against double jeopardy does not bar prosecution on the two remaining charges of criminal trespass and rape.

We begin our study with a determination of whether the applicable provisions of the Crimes Code preclude the second prosecution in this case. See Commonwealth v. Hude, ___ Pa. ___, ___, 458 A.2d 177, 1980 (1983) (the court will only consider double jeopardy complaints if it is determined that the statutory provisions of the Crimes Code do not require the grant of the relief requested). Section 109-112 of the Crimes Code, 18 Pa.C.S.A. §§109-112, ban second prosecutions in various instances,[9] but these provisions are not applicable to the facts of this case. Although section 107 of the Crimes Code, 18 Pa.C.S.A. §107,

provides that the provisions of Part 1 of Title 18, which includes sections 109-112, are applicable to offenses defined by Title 18, including all of the offenses here charged, sub-section (c) of section 107 provides a number of exceptions, including the provision that section 107 "does not affect the power of a court ... to punish for contempt ...". Thus, we proceed to consider the federal and state constitutional prohibitions against double jeopardy since the statutory provisions do not require the grant of the relief requested.

"The constitutional prohibition of double jeopardy has been held to consist of three separate guarantees: (1) 'It protects against a second prosecution for the same offense after acquittal. [(2)] It protects against

a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense.'" Illinois v. Vitale, 447 U.S. 410, 415, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 228, 235 (1980). Quoting North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.ED.2d 656 (1969) (footnotes omitted). The second of these three guarantees is the focus of our attention in this appeal since appellant contends that the finding that he was in contempt was such a conviction as to bar any prosecution on the charges now pending against him. Any analysis of this contention necessarily involves a determination of whether the contempt proceeding was criminal in nature.

"Contempt" is classified either as

civil contempt or criminal contempt. The two types may be distinguished from one another by analyzing the primary purpose and objective of the court's order. Commonwealth v. Marcone, 487 Pa. 572, 410 A.2d 759 (1980); In Re "B", 482 Pa. 471, 394 A.2d 419 (1978); Commonwealth v. Feick, 294 Pa. Super. 110, 439 A.2d 774 (1982). "A citation is for criminal contempt if the court's purpose was to vindicate the dignity and authority of the court and to protect the interest of the general public. If the purpose of the citation is to coerce the contemnor into compliance with the order of the court to do or refrain from doing some act primarily for the benefit of the litigant or a private interest, it is civil contempt. Commonwealth v. Charlett, 481 Pa. 22, 391 A.2d 1296,

1298 (1978); citing Woods v. Dunlop, 461 Pa. 35, 40 n. 2, 334 A.2d 619, 622 n. 2 (1975)." Feick, supra at 112-13, 439 A.2d at 775. Further, "if the contempt consists solely of a past act, the only allowable judicial response is punitive, and any contempt adjudication must be criminal." In re Martorano, 464 Pa. 66, 80 n.19, 346 A.2d 22, 29 (1975). Cipolla v. Cipolla, 264 Pa. Super. 53, 57, 398 A.2d 1053, 1055 (1979).

It seems certain that the citation we examine is one of criminal contempt, not civil, since the dominant purpose of the proceeding was to determine whether appellant had disobeyed the order entered pursuant to the Protection From Abuse Act and, if he had, to punish appellant so as to preserve the authority of the court and

to protect the interests of the general public. See Cipolla v. Cipolla, supra.

Two classes of criminal contempt, direct and indirect, are recognized in this Commonwealth. Our Supreme Court has distinguished between the two:

> The essence of [direct criminal] contempt is that the misconduct constitutes a direct affront to the dignity and authority of the court.... Where that disobedience or misbehavior occurs in the actual presence of the court or has the capacity of directly affecting the proceeding then in progress, it may be properly classified as a direct or the most grievous type of contempt. All other behavior which may have a more remote impact upon the dignity of the court and its ability to fulfill its responsibilities are classified as indirect criminal contempts.

Commonwealth v. Maurizio, 496 Pa. 584, ___, 437 A.2d 1195, 1196 (1981); quoting Commonwealth v. Marcone, supra at 579, 410 A.2d at 762-63. Therefore, it seems clear that the wife of appellant here sought a citation for

indirect criminal contempt since the conduct that we examine occurred outside the presence of the court. Further, this court in Cipolla v. Cipolla, supra, an opinion authored by our illustrious colleague, Judge John P. Hester, ruled that the contempt displayed by a husband who had violated an order issued pursuant to the Protection From Abuse Act was indirect criminal contempt. And, finally, the Protection From Abuse Act itself dictates that "upon violation of a protective order ... the court may hold appellant in indirect criminal contempt and punish him in accordance with law." 35 P.S. §10190(a). Thus, the authority for our conclusion is certain.

The contention of appellant that the prior contempt conviction bars subsequent prosecution for criminal

trespass, simple assualt and rape, is premised on two separate protections afforded an accused. One focuses on the proof necessary to prove the statutory elements of each offense, Illinois v. Vitale, supra at 417, 100 S.Ct. at 2265, 65 L.Ed.2d at 235; Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 194 (1977), while the other protection was set forth by the Pennsylvania Supreme Court in the Campana decisions[10] and provides that all known criminal offenses arising from the same criminal episode must be concluded in one prosecution.

It is clear from the decisions of the United States Supreme Court that our study of whether the double jeopardy clause of the United States Constitution affords appellant the relief requested requires a

determination of whether the elements of the contempt charged includes the same element as compose the offenses of criminal trespass, simple assault and rape.

> In Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring successive prosecutions. Quoting from Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) which in turn relied on Gavieres v. United States, 220 U.S. 338, 342-343, 31 S.Ct. 421, 422, 55 L.Ed. 489 (1911), we held that
>
> > "'[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" 432 U.S., at 166, 97 S.Ct., at 2225.
>
> We recognized that the Blockburger test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. Thus we stated that if

> "'each statute requires proof of an additional fact which the other does not,' Morey v. Commonwealth, 108 Mass. 433, 434 (1871)," the offenses are not the same under the Blockburger test. 432 U.S. 770, 785, n. 17, 95 S.Ct. 1284, 1294, n. 17, 43 L.Ed.2d 616 (1975).

Illinois v. Vitale, supra at 417, 100 S.Ct. at 2265, 65 L.Ed.2d at 235 (footnote omitted).

As we commence this study, we note that the order of April 18, 1980, issued pursuant to the Protection From Abuse Act provided, inter alia, that appellant refrain from physically abusing, striking or harassing his wife and children. It was on the basis of this order that the Common Pleas Court found at the contempt hearing that appellant had violated the terms of the order in that he "physically abused his wife by attempting to cause or intentionally, knowingly and recklessly

causing bodily injury to her, on the late evening hours of May 7th or early morning hours of May 8th, or both; therefore, the court finds Charles J. Allen to be in contempt of court." (N.T. 5/28/80 at 95).

An examination of the notions expressed by other jurisdictions when confronted with similar or identical issues assists our comparison of those elements to be proved at the contempt hearing with those elements necessary to be proved for each of the three charges which appellant now seeks to dismiss by.

The question of whether the application of the "same evidence" test bars a conviction for indirect criminal contempt and a conviction on the substantive crime when both crimes are based on the same course of conduct has

previously been addressed by a number of court.[11] The Supreme Court of Illinois determined in People v. Gray, 69 Ill.2d 44, 370 N.E.2d 797 (1977), cert. denied, Illinois v. Gray, 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978), that where a defendant was tried, convicted and punished for indirect criminal contempt of court for violation of a protective order by striking his wife with a gun and then shooting her, the constitutional guarantee against double jeopardy barred defendant's subsequent prosecution for aggravated battery arising out of the same conduct.[12] The majority of the court in Gray reasoned that "[c]onsiderations of fairness and finality, the very foundation of the double jeopardy bar, require a non-technical evaluation of the 'same

evidence' test, and focus upon the similarity of the elements involved in the two proceedings." Id. at ___, 370 N.E.2d at 800. Thus, the court held that although the contempt conviction required the establishment of an additional element, the prosecution for aggravated battery required no proof beyond that provided for the contempt conviction. The dissent, however, asserted that significantly different elements were involved in the proof of each offense since the criminal contempt in Gray required the element of wilful disobedience of a court order, while aggravated battery required that the defendant (a) intentionally or knowingly caused grave bodily harm, permanent disability or disfigurement or (b) used a deadly weapon. Ill. Rev. Stat. 1973, ch. 38,

pars. 12-4(a)(b). The dissent then concluded that even though both prosecutions arose from the same course of conduct of the defendant, the application of the Blockburger v. United States, supra, test permitted the two prosecutions. This conclusion of the dissent was based on the view that "contempt retains its distinctive function in specifically protecting our judicial system from abuse" and that "the additional element of wilful disobedience in [the] case is neither immaterial nor insubstantial in distinguishing criminal contempt from ordinary offenses." Id. at ___, 370 N.E.2d at 803.

In contrast to the approach taken by the majority in Gray, the Supreme Judicial Court of Massachusetts held in Commonwealth v. Gallarelli, 372 Mass.

573, 362 N.E.2d 923 (1977), that where defendants were tried and convicted on a criminal complaint which charged that their conduct had interfered with the administration of justice and also constituted contempt of court, such prosecution was not a bar to subsequent trial and conviction for conspiracy to influence a jury where both prosecutions were based on the same incident. The Massachusetts court reasoned that while the Commonwealth was requested to prove an unlawful agreement for the conspiracy indictment, such rpoof was not necessary for a conviction of contempt tending to interfere with, impede, and obstruct the proper administration of justice to convict the defendants of contempt, such proof was not necessary for a conspirary conviction.

Certain other decisions have specifically addressed the question of whether the wilful intent to disobey an order that is a necessary element for the criminal contempt is an additional element for the purposes of the "same evidence" test. Where defendants had been prosecuted on charges of price-fixing, the court in United States v. United States Gypsum Co., 404 F.Supp. 619 (D.D.C. 1975), held that they could not subsequently be prosecuted on a contempt charge based on violations of an order which specifically prohibited price-fixing. The court concluded that "the addition of the element of a wilful violation of a court decree as present here is not in the Court's view sufficiently material or substantial to supersede the considerations of fairness and

finality which form the basis of the double jeopardy bar." Id. at 623.

A similar rationale was provided in the foundation for the decision of the District Court in United States v. Haggerty, 528 F.Supp. 1286 (D.Colo. 1981). A group of air traffic controllers had filed a motion to dismiss prosecutions on charges of participating in a strike against the government on the grounds that they had previously been convicted of criminal contempt for violating a court order which prohibited them from striking against the government. Even though the additional element of intent to violate the court order had to be proven in order to prove contempt, the court concluded that the court order, which formed the basis of the contempt proceeding, prohibited the strike

activities which were the subject to the second prosecution of striking against the government. The court reasoned that since the only additional element that the government had to prove in the contempt proceeding was a wilful violation of the order, it was not necessary for the government to prove any additional facts in the second prosecution, and concluded that the case was not one in which "each statute requires proof of the fact that the other does not". As a result, the court held that the second prosecution was barred by the double jeopardy clause.

The instant case differs from Haggerty and United States Gypsum Co., supra, since the criminal trespass and rape charges each require proof of facts additional to those which were

necessary to secure the contempt conviction. The contempt order in this case directed appellant to refrain from physically abusing, striking or harassing his wife. The charges of criminal trespass and rape each require the presentation of evidence upon elements that go beyond the proof necessary to convict appellant of contempt. Since charges of violation of the "protection" order required proof of a wilful intention to violate that order, a prosecution upon the charges of trespass and rape is not barred under the "same evidence" test. This same analysis demonstrates, however, that the prosecution for assault must be abandoned since, although the contempt conviction required a finding of an additional element, namely, the intent to violate

the order, the charge of criminal contempt and the charge of simple assault did not each require proof of an additional fact. Therefore, a prosecution of the charge of simple assault is barred under the double jeopardy clause of the federal constitution.

There remains for study the question of whether the prosecution for the remaining charges of criminal trespass and rape is barred by reason of the protections afforded a defendant by the courts of this Commonwealth. Appellant argues that the prosecution is barred by application of the rule adopted by the Pennsylvania Supreme Court in Campana I and II, supra, which provides that criminal offenses arising from the same criminal episode must be disposed of in one prosecution.[13] This

rule of compulsory joinder affords a defendant a different protection from that afforded by the same evidence test, since compulsory joinder permits only one prosecution if the charge arises from the same criminal event, regardless of whether different evidence supports the charges and regardless of whether distinct acts are involved. Our Supreme Court has offered the following rationale for the compulsory joinder rule:

> The compulsory joinder rule set forth in Campana I and II and the provisions of section 110 were designed to serve two distinct policy considerations: (1) to protect a person accused of crimes from governmental harassment of being forced to undergo successive trials for offenses stemming from the same criminal episode; and (2) as a matter of judicial administration and economy, to assure finality without unduly burdening the judicial process by repetitious litigation. See Commonwealth v. Stewart, supra 493 Pa. at 29, 425 A.2d at 348;

> Commonwealth v. Holmes, 480 Pa. 536, 541, 391 A.2d 1015, 1017 (1978); Commonwealth v. Tarver, supra, 467 Pa. at 408, 357 A.2d at 542. 'By requiring compulsory joinder of all charges arising from...[the same criminal episode], a defendant need only once 'run the gauntlet' and confront the awesome resources of the state.' Commonwealth v. Campana, (Campana I), 452 Pa. at 251, 304 A.2d at 440-441.

Commonwealth v. Hude, supra at _____, 458 A.2d at 180.

Hude specifically states that the determination of whether particular acts constitute a single criminal episode requires a consideration of the temporal sequence of events as well as the logical relationship between the acts. Commonwealth v. Hude, supra at ___, 458 A.2d at 181. The temporal relationship between the criminal acts is a factor which frequently determines whether the acts are logically related, but the definition of single criminal

episode is not limited to those acts which are immediately connected in time. Id. at ___, 458 A.2d at 182. Quoting Comment, Commonwealth v. Campana and Section 110 of the Crimes Code: Fraternal Twins, 35 U. of Pitts. L. Rev. 275, 286-87 (1973). The criminal offenses charged against appellant were committed during a course of criminal behavior and violence directed toward and against one victim and within a continuing five hour period. Thus, we conclude that the criminal offenses were temporally and logically related as a part of a continuing scheme of criminal activity. Such a conclusion does not, however, trigger a bar to the prosecution on the rape and criminal trespass charges since we hold that the subsequent prosecution does not here present the

type of governmental harassment of a defendant that would offend double jeopardy concerns.

We so hold because the Pennsylvania Supreme Court has made clear that the need for the protection of the accused from governmental harassment is but one of the considerations which inspired it to adopt the compulsory joinder rule. Commonwealth v. Beatty, supra at ___, 455 A.2d at 1197. Citing Commonwealth v. Holmes, 480 Pa. 536, 391 A.2d 1015 (1978); Commonwealth v. Tarver, 467 Pa. 401, 357 A.2d 539 (1976). The Beatty court held that neither the compulsory joinder rule nor section 110(1)(ii) of the Crimes Code barred prosecution in the Common Pleas Court for aggravated assault where defendant had previously pleaded guilty to the summary offense of failure to identify himself at the

scene of the accident, even though both charges arose out of the same criminal incident. The court reasoned that there is no bar since both prosecutions were not within the jurisdiction of a single court, and proceeded to state, as a further basis for the result, that the second prosecution in the case did "not present the type of governmental harassment of a defendant that would offend double jeopardy concerns." Id. at ___, 455 A.2d at 1198.

It would seem, therefore, that Beatty requires consideration of a further notion when this issue arises - a notion which in this case can be stated as - whether a prosecution for rape and criminal trespaass following a pervious prosecution on an indirect criminal contempt charge, where all charges arose out of the same criminal

episode, is the type of governmental harassment that offends the double jeopardy protection afforded by this Commonwealth. The double jeopardy issue posed in this situation is, if not unique, greatly different from the typical factual situation in which the double jeopardy issue is presented. One cannot gainsay the fairness of the principle that government must undertake in one proceeding the prosecution of any and all violations of the Crimes Code that occur during a particular episode, but the behavior with which we are confronted consisted not only of violations of the Crimes Code but also of a bold defiance of the authority of the court - an authority rooted in the natural order and ratified through centuries of jurisprudence. Therefore, we conclude

that while, as we have earlier noted, double jeopardy principles apply in indirect criminal contempt proceedings, where the first proceeding is an indirect criminal contempt proceeding, a subsequent prosecution for the crimes which composed the contempt does not present the type of governmental harassment that the compulsory joinder rule of Campana I and Campana II was designed to prevent.

Order reversed in part and affirmed in part. The charge of simple assault is dismissed. Case remanded for proceedings consistent with this opinion on the criminal trespass and rape charges.[14] Jurisdiction is relinquished.

Cercone, P.J. concurs in the result.

Hoffman, J., files dissenting opinion.

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[1] 18 Pa. C.S.A. §3503.

[2] 18 Pa.C.S.A. §2701.

[3] 18 Pa.C.S.A. §3121.

[4] An appeal of a pre-trial application seeking discharge on double jeopardy grounds in an appealable order. Commonwealth v. Fields, 491 Pa. 609, 421 A.2d 1051 (1980); Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977); Commonwealth v. Beckman, 304 Pa.Super. 239, 450 A.2d 660 (1982).

[5] 35 P.S. §10181.

[6] We note that although the rape charge was filed after the other charges, the Commonwealth was aware of the claimed rape at the time the other charges were filed since the affidavits of probable cause for the simple assault and criminal trespass each contained a statement that the complainant had been raped.

[7] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject to the same offense to be twice put in jeopardy of a life or limb." The Fifth Amendment guarantee against double jeopardy is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395

U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

8 Section 10 of Article 1 of the Pennsylvania Constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb;..."

9 The protection afforded by these sections are as follows: 18 Pa.C.S.A. §109 addresses prosecutions barred by a former prosecution for the same offense; 18 Pa.C.S.A. §110 sets forth conditions when a prosecution would be barred by a former prosecution for a different offense; 18 Pa.C.S.A. §111 describes that situation when a prosecution would be barred by a former prosecution in a foreign jurisdiction; and 18 Pa.C.S.A. §112 provides a qualification to §§109, 110 and 111.

10 The compulsory joinder rule was promulgated in the two decisions of Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432, vacated and remanded, 414 U.S. 808 (1983) [Campana I], on remand, Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, cert. denied, 417 U.S. 969 (1974) [Campana II].

11 Distinguishable are cases where defendants are summarily held in contempt of court. See United States v. Rollerson, 308 F.Supp. 1014 (D.D.C. 1970), aff'd., 449

F.2d 1000 (D.C. Cir. 1971); State v. Warren, 186 N.J. Super. 35, 451 A.2d 197 (1982); United States v. Mirra, 220 F.Supp. 361 (S.D. N.Y. 1963). In summary contempt proceedings the contemnor does not suffer the harassment of separate trials and, therefore, the policies and goals underlying the protection against double jeopardy are not offended.

12 Defendant had been acquitted of attempted murder.

13 The distinguished Justice Robert N. C. Nix, Jr. provided in Commonwealth v. Beatty, ___ Pa. ___ ,____, 455 A.2d 1194, 1196 (1983), the following synopsis of the Campana decisions: "[In Campana I, t]he compulsory joinder of all offenses arising from the 'same criminal episode' was advanced in a plurality opinion authored by Mr. Justice Roberts and joined by Justices O'Brien and Manderino. Mr. Justice Eagen, in a concurring opinion joined by Chief Justice Jones, urged the adoption of the 'same offense' test. This writer in a concurring opinion expressed a willingness to accept the "same criminal episode' test as a matter of state law but rejected any implication that such a result was constitutionally compelled under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Mr. Justice Pomeroy, dissenting, did not

disagree with 'the same criminal episode' approach but rather dissenting on the grounds that such a rule was not constitutionally mandated.
However, in Campana II a unanimous Court accepted the 'same criminal episode' test for compulsory joinder since Mr. Justice Pomeroy's dissent did not challenge the validity of the adoption of the same criminal episode rule under the Court's supervisory powers."

14 We note that the definition of rape under the Crimes Code, 18 Pa.C.S.A. §3121, is limited to "sexual intercourse with a person not his spouse,..." This issue has not been presented for our consideration.

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 2393 Philadelphia 1980

COMMONWEALTH OF PENNSYLVANIA

v.

CHARLES J. ALLEN, Appellant

Appeal from the Order of the
Court of Common Pleas of Lebanon
County, Criminal Division,
at No. 328 of 1980.

Before: CERCONE, P.J.. McEWEN, and
HOFFMAN, JJ.

DISSENTING OPINION BY HOFFMAN, J.:

Having succeeded in having appellant jailed, tried, convicted and fined for his actions of May 7 and 8, the Commonwealth now seeks to try appellant on more serious charges arising out of the same criminal episode. Because I find such a prosecution the "type of governmental harassment of a defendant that would offend double jeopardy concerns," I dissent.

"[T]he state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity ...." Commonwealth v. Hude, ___ Pa. ___, ___, 458 A.2d 177, 182 (1983), quoting Green v. United States, 355 U.S. 184, 187 (1957). Nor can the state be permitted to test the strength of its case and discover a defendant's trial strategy or defense by first trying him on a lesser charge and then later on the more serious charges. See Commonwealth v. Hude, supra, at ___, 458 A.2d at 182 ("dry runs" to obtain convictions impermissible). Thus, in Commonwealth v. Campana, 452 Pa. 237, 304 A.2d 452,

vacated and remanded, 414 U.S. 808 (1973), on remand, 455 Pa. 622, 314 A.2d 854, cert. denied, 417 U.S. 969 (1974), our Supreme Court "expressly bar[red] a subsequent prosecution for any offense arising from the same criminal episode, where the offense was known to the prosecuting authorities at the time of the commencement of the first trial." Commonwealth v. Holmes, 480 Pa. 536, 540, 391 A.2d 1015 (1978).

Here, appellant was charged with simple and aggravated assault three days prior to his arraignment on the contempt charge. Although appellant had been able to post the $1,000 bond required for his release on the assault charges, the lower court set bail for the contempt charge at $5,000, resulting in appellant's return to Lebanon County Prison until his

contempt hearing. Appellant was then subjected to a full adversarial proceeding to determine his criminal culpability. The Commonwealth presented the tesetimony of appellant's wife and two police officers while appellant countered with his own testimony. After the lower court found appellant guilty of contempt and fined him $750, the Commonwealth brought yet another charge against him arising from the same incident, rape.

The majority's conclusion that a second prosecution is beyond the parameteres of the double jeopardy protections is untenable. The Commonwealth had sufficient knowledge to charge and, in fact, did charge appellant with assault before proceeding with the contempt action. The Commonwealth tested the strength of

its case and discovered appellant's defense in preparation for trial on the greater charges. Appellant will again be subjected to criminal liability, embarrassment, expense and uncertainty for actions for which he has already been tried and convicted. Contrary to the majority, I find forcing appellant to run the gauntlet a second time for the events of May 7 and 8 offends double jeopardy protections. Accordingly, I dissent.

IN THE COURT OF COMMON PLEAS
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	ACTION NO.
	:	328
vs.	:	
	:	1980
CHARLES J. ALLEN	:	

ORDER OF COURT

AND NOW, to wit, October 8, A.D., 1980 for the reasons set forth in the accompanying Opinion, Defendant's Omnibus Pretrial Motion for Relief in the nature of a Motion to Quash; and a Motion for Continuance, is dismissed. Conversely, the Court directs the record of the hearing conducted May 28, 1980 under No. 941, 1980 Civil Action - Law to be transcribed by October 24, 1980.

BY THE COURT,

/s/ G. Thomas Gates P.J.
G. Thomas Gates

/s/ John A. Walter J.
John A. Walter

IN THE COURT OF COMMON PLEAS
LEBANON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	ACTION NO.
	:	328
vs.	:	
	:	1980
CHARLES J. ALLEN	:	

APPEARANCES:

WILLIAM L. THURSTON, ESQUIRE
Assistant District Attorney
FOR THE COMMONWEALTH

GEORGE E. CHRISTIANSON, ESQUIRE
and
KENNETH C. SANDOE, ESQUIRE
Christianson, Meyer
FOR THE DEFENDANT

OPINION, WALTER, J., FOR THE COURT EN BANC, OCTOBER 8, A.D., 1980.

On April 18, 1980 this Court issued an order pursuant to the Protection from Abuse Act[1] enjoining defendant, Charles J. Allen, from physically abusing, striking or harassing his wife and minor children. We thereafter received notice on May 19, 1980 that the defendant had violated the order in that he gained entry into the house where his wife and children

were residing and there injured his wife during the late evening hours of May 7 or early morning hours of May 8, 1980. A hearing on the contempt charges was held on May 28, 1980, after which, we found defendant to be in contempt of court and ordered him to pay costs and a fine of $750.00.

On May 16, 1980 a criminal complaint was filed against defendant for simple assault and criminal trespass arising out of the May 7-8 incident. Furthermore, on June 3, 1980 another criminal complaint was filed against defendant for the rape of his wife on May 7-8.

Preliminary hearings were held on the criminal charges; defendant was bound over for court on each count. Defendant was thereafter arraigned on July 30, 1980. He pleaded not guilty to both complaints.

On August 26, 1980 defendant filed an omnibus pretrial motion which is now

before us for disposition. We have been favored with briefs and oral argument.

Defendant raises the following issue for our consideration:

> "Whether the Constitutional guarantees against double jeopardy prohibit criminal prosecution for rape, simple assault and defiant trespasser after a finding and punishment for indirect criminal contempt of court based upon the same conduct or episode?"

Defendant placed great reliance on the Illinois case of People v. Gray, ___ Ill. ___, 370 N.E. 2d 797 (1977). In Gray, supra, the defendant struck his wife with a gun and then shot her. This violated a protective order in a divorce proceeding which enjoined Gray from molesting his wife. The trial judge in the divorce case conducted a hearing and found defendant to be in willful contempt of court. He was sentenced to six months in jail. Subsequently, he was indicted and convicted of aggravated assault and attempted murder based on the same conduct. The Illinois Supreme

Court was not in contempt. The wife appealed. The Superior Court held that: ". . . an adjudication, on the merits, of not guilty of indirect criminal contempt is an absolute bar to appellate review." Id. at ___, 398 A.2d at 1057. Thus, the same reasons that forbid the Commonwealth from appealing a not guilty verdict in a criminal case, also prohibit an appeal by the verdict loser in a criminal contempt case.

We do not agree that People v. Gray, supra, is the logical extension of Cipolla v. Cipolla, supra, in our jurisdiction. We find the nexus urged by defendant to be strained. The acts occurring on May 7-8 resulted in two separate transgressions when scrutinized through the spectacles of double jeopardy. One consisted of the violation of this Court's order and resulted in contempt. The other constituted a violation of the criminal law and resulted in criminal

charges. Whereas the object of contempt is to protect and preserve the dignity of the court, the object of a criminal prosecution is to protect its citizenry from harm. The two concepts are mutually exclusive. To hold otherwise would offend both reason and logic.

Were we to accept defendant's position that the rules of double jeopardy apply to bar the subsequent criminal prosecutions, then minor contempt penalties could potentially bar prosecutions for serious criminal offenses. We do not believe that was the intent of our legislature in passing the Abuse Act.

Furthermore, it is a general rule that former jeopardy cannot be invoked on the ground that the same act is punishable both as a contempt of court and as a crime. 21 AmJur 2d, Criminal Law, §169. See also 17 AmJur 2d, Contempt, §65.

Likewise 22 Corpus Juris Secundum,

Criminal Law, §293 states, as follows:

> "Indictable statutory offenses may be punished as such, while the offenders likewise may be subjected to punishment for the same acts as contempts, the two being diverso intuitu, and capable of standing together. Thus one who makes an assault in the presence of the court in such a manner as to constitute a contempt of court is punishable, not only for the contempt, but also for the assault, and even though a perjury charge is based on the same act as that punished in contempt proceedings, accused is not placed thereby in double jeopardy.
>
> "One committing an act which he is enjoined from committing and which is a violation of a penal law may be punished for contempt for violating the injunction, and he may be punished also for a violation of the criminal law. Consequently a statute providing that the sale of intoxicating liquors may be enjoined, and that violations of injunctions thereof may also be punished as contempt of court, is not in violation of the rule against double jeopardy."

Despite the zeal evident in defendant's well written brief and the compelling arguments so nobly advanced in it we are persuaded, and so hold, that Charles J. Allen may both be found in contempt and criminally prosecuted

for the same conduct. Accordingly his onmnibus pretrial motion for relief in the nature of a Motion to Quash Information will be turned aside.

Defendant did not address in his brief the second issue raised in his Omnibus motion - a request for continuance for purpose of having transcribed the record of the indirect criminal contempt hearing. Because that hearing was relatively short we perceive little if any trouble having that accomplished before the next term of Criminal Court. Thus no continuance will be requisite.

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1 Pa. Statutes Annotated, Title 35, §§10181-10190 (Purdon Supp. 1977) [hereinafter referred to as the Act.]

PROTECTION FROM ABUSE ACT

Cross References
Costs, see 42 Pa.C.S.A. §1725.1.

§10181. Short Title

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

Law Review Commentaries

A symposium: Medical, legislative, and legal aspects of child abuse and neglect. (1977-1978) 23 Vill.L.Rev. 445.

Protection From Abuse Act. (1978) 51 Temple L.Q. 116.

Role of the lawyer in matrimonial cases. Eric D. Turner, (1979-80) 25 Vill.L.Rev. 696.

Spouse abuse: A novel remedy for a historic problem. (1979) 84 Dick.L.Rev. 147.

Notes of Decision

In general 1
Purpose 2
Validity 1/2

1/2. Validity

The Protection From Abuse Act (35 P.S. §10181 et seq.), is not unconstitutional because it permits a spouse to be excluded from jointly owned property for a temporary period without an opportunity to be heard, since it bears a real and subsequential relationship to its purpose of protecting spouses from abuse and is therefore a valid exercise of the police power. Boyle v. Boyle, 12 D. & C.3d 767, 1979.

This act is not unconstitutional as depriving a party of his property without the benefit of jury trial, since this act does not involve any criminal proceeding but invokes the equitable powers of the court. Id.

This act is not unconstitutional for vagueness. Id.

This act is not unconstitutional as ex post facto in that it permits consideration of incidents prior to its

effective date in determining the relief to be granted. Id.

1. In general

The Protection From Abuse Act could not be invoked by petitioner where respondent former boyfriend and alleged father of her child had not lived with her for five years. Vanderhurst v. Rice, 17 D. & C.3d 225, 1980.

Since the Protection From Abuse Act does not create any category, or prohibit acts, but only erects a new remedy for one who is the victim of assault and battery, an action may properly be brought under the act after its effective date for an injury occurring before that date, particularly where plaintiff is still suffering from the injury. Smittle v. Smittle, 2 D. & C.2d 476, 1977.

2. Purpose

The Protection From Abuse Act is a vanguard measure dealing with problems of wife and child abuse and is designed to protect against abuse not only between family or household members who reside together, but also between unmarried persons living together. Cipolla v. Cipolla, 398 A.2d 1053, 264 Pa.Super. 53, 1979.

The Protection From Abuse Act is a vanguard civil measure designed to protect against abuse and is a constitutional exercise of the

legislature's power. Mahorsky v. Mahorsky, 22 D. & C.3d 210, 1982.

§10182. Definitions

As used in this act:

"Abuse" means the occurrence of one or more of the following acts between family or household members who reside together and both parties continue to have legal access to the residence:

(i) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon.

(ii) Placing in physical menace another in fear of imminent serious bodily injury.

(iii) Sexually abusing minor children as defined pursuant to the act of November 26, 1975 (P.L. 438, No. 124), known as the "Child Protective Services Law."

"Adult" means any person 18 years of age or older.

"Court" shall mean the court of common pleas.

"Family or household members" means spouses, persons living as spouses, parents and children, or other persons related by consanguinity or affinity.

Terms not otherwise defined by this act shall have the meaning given to them by the Crimes Code.

As amended 1978, June 23, P.L. 513, No. 81, §1, effective in 60 days.

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

§10183. Jurisdiction

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial

custody and visitation of minor children.

Notes of Decision

1. Purpose

The Protection From Abuse Act is a vanguard measure dealing with problems of wife and child abuse and is designed to protect against abuse not only between family or household members who reside together, but also between unmarried persons living together. Cipolla v. Cipolla, 398 A.2d 1053, 264 Pa.Super. 53, 1979.

§10184. Commencement of proceeding

(a) A person may seek relief under this act for himself or herself, or any parent or adult household member may seek relief under this act on behalf of minor children by filing a petition with the court alleging abuse by the defendant.

(b) If the plaintiff files an affidavit stating that he or she does not have funds available to pay the costs of filing and service, the petition shall be filed and service shall be made without payment of costs and leave of court to proceed in forma pauperis shall not be required. When the petition is filed without payment of costs, the court shall determine at the hearing on the petition if the

plaintiff is indigent. If the court finds that the plaintiff is not indigent the court may order the plaintiff to pay the court costs.

As amended 1978, June 23, P.L. 513, No. 81, §1, effective in 60 days.

Rules of Civil Procedure

Under Pa.R.C.P. No. 1911.30, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1910.1 et. seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

Cross References

Rules of Civil Procedure, see Pa.R.C.P. No. 1901 et seq., 42 Pa.C.S.A.

Notes of Decision

1. In general

The filing of preliminary objections to a petition in a protection from abuse action is not permitted. Mahorsky v. Mahorsky, 22 D. & C.3d 210, 1982.

§10185. Hearings

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A, this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

Notes of Decision

1. In general

In proceeding in which defendant was convicted of charges arising out of alleged physical abuse of child, error in admitting polygraph evidence unfavorable to defendant was prejudicial in context in which nurses, doctors and social worker all expressed skepticism as to the truth of assertions made by defendant at time child was hospitalized. Com. v. McIntoch, 435 A.2d 1263, 291 Pa.Super. 352, 1981.

Where plaintiff participated in starting and perpetuating incidents of marital dispute and where respondent attempted to have sexual relations with plaintiff in a manner which did not

exceed reasonable bounds, no abuse within the meaning of the Protection From Abuse Act was shown by such incidents. Wagner v. Wagner, 15 D. & C.3d 148, 1980.

The participation of respondent in a hearing upon a Protection From Abuse Act petition held more than ten days after the filing of the petition constitutes a waiver of any objection to the hearing outside the statutory period. Id.

Where respondent changed the locks on the home he jointly owned with plaintiff and threatened to physically remove plaintiff from the home, such ultimatum can constitute a grave risk of, and an attempt to inflict, bodily injury in the context of past altercations between the parties; such an ultimatum can establish abuse within the meaning of this act. Id.

In evaluating a respondent's conduct to determine if it constituted abuse within the meaning of this act, the court may consider other incidents between the parties which did not constitute abuse due to the mutual fault of both parties. Id.

§10186. Relief

(a) The court shall be empowered to grant any protection order or approve any consent agreement to bring about a cessation of abuse of the

plaintiff or minor children, which may include:

(1) Directing the defendant to refrain from abusing the plaintiff or minor children.

(2) Granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant and/or restoring possession to the plaintiff when the residence or household is jointly owned or leased by the parties or is owned or leased by the entireties or is owned or leased solely by the plaintiff.

(3) When the defendant has a duty to support the plaintiff or minor children living in the residence or household and the defendant is the sole owner or lessee, granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant and/or restoring possession to the plaintiff, or by consent agreement allowing the defendant to provide suitable, alternate housing.

(4) Awarding temporary custody of and/or establishing temporary visitation rights with regard to minor children.

(5) After a hearing in accordance with section 5(a),

directing the defendant to pay financial support to such persons as defendant has a duty to support. Such a support order is temporary and any beneficiary of the order must petition for support under the provisions of the Civil Procedural Support Act within two weeks of the date of the issuance of the protection order. If such a petition is not filed, that portion of the protection order requiring the defendant to pay support is void. When there is a substantial ruling on a petition for support under the Civil Procedural Support Act the portion of the protection order requiring the defendant to pay support becomes void.

(b) Any protection order or approved consent agreement shall be for a fixed period of time not to exceed one year. The court may amend its order of agreement at any time upon subsequent petition filed by either party.

(c) No order or agreement under this act shall in any manner affect title to any real property.

As amended 1978, June 23, P.L. 513, No. 81, §1, effective in 60 days.

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A., this section is not

deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

Notes of Decision

truction and application 1
ew 2

Construction and application

Where husband failed to file ptions to trial court order uding him from this home for one pursuant to Protection from Abuse he waived issue for purposes of al of whether evidence was fficient to warrant order excluding from marital home. Lucia v. Lucia, A.2d 700, Super. 1983.

Relief under this act would not be ted where the petition filed ared to be a tactical tool in tal litigation. Smith v. Smith, 18 C.3d 703, 1981.

An order of support may be entered nst respondent as a part of the t's order under this act, even gh petitioner did not pray for

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support in her petition. Brookhart v. Brookhart, 17 D. & C.3d 795, 1981.

2. Review

Failure to enter on lower court docket an order vacating protection-from-abuse order which had previously been issue depriving the superior court of jurisdiction. Schwartz v. Schwartz, 465 A.2d 1024, Super. 1983.

§10187. Notification

A copy of any order under this act shall be issued to the plaintiff, the defendant and the police department with appropriate jurisdiction to enforce the order or agreement, in accordance with the provisions of this act or as ordered by the court.

As amended 1978, June 23, P.L. 513, No. 81, §1, effective in 60 days.

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A, this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to

actions for custody, partial custody and visitation of minor children.

§10188. Emergency relief

(a) When the court is unavailable from the close of business at the end of the week to the resumption of business at the beginning of the week a petition may be filed before a district justice or Philadelphia Municipal Court Judge who may grant relief in accordance with section 6(a), (2) or (3) if the district justice or Philadelphia Municipal Court Judge deems it necessary to protect the plaintiff or minor children from abuse, upon good cause shown in an ex-parte proceeding. Immediate and present danger of abuse to the plaintiff or minor children shall constitute good cause for purposes of this action.

(b) Any order issued under subsection (a) shall expire as of the resumption of business of the court at the beginning of the week or within 72 hours, whichever occurs sooner; at which time, the plaintiff may seek a temporary order from the court.

(c) Any order issued under this section and any documentation in support thereof shall be immediately certified to the court. Such certification to the court shall have the effect of commencing proceedings under section 4 and invoking the other provisions of this act.

As amended 1978, June 23, P.L. 513, No. 81 §1, effective in 60 days.

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

§10189. Procedure

Unless otherwise indicated in this act, any proceeding under this act shall be in accordance with the Rules of Civil Procedure and shall be in addition to any other available civil or criminal remedies.

As amended 1978, June 23, P.O. 513, No. 81, §1, effective in 60 days.

Rules of Civil Procedue

Under Pa.R.C.P. No. 1910.30, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, 42 Pa.C.S.A., this section is not deemed suspended or affected by Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

Notes of Decision

1. In general

Failure of husband to file exceptions to order directing him to refrain from threats of abuse toward his wife and to keep the peace constituted a waiver of issue whether actions of husband toward his wife fell with the Protection from Abuse Act and, as such, required an affirmance of order on appeal. Knisely v. Knisely, 441 A.2d 438, 295 Pa.Super. 240, 1982.

§10190. Contempt

(a) Upon violation of a protection order or a court approved consent agreement the court may hold the defendant in indirect criminal contempt and punish him in accordance with law.

(b) Notwithstanding any provision of the law to the contrary any sentence for this contempt may include imprisonment up to six months or a fine not to exceed $1,000 or both and the defendant shall not have a right to a jury trial on such a charge.

(c) An arrest for violation of an order issued pursuant to this act may be without warrant upon probable cause whether or not the violation is committed in the presence of the police officer. The police officer may verify, if necessary, the existence of a protection order by telephone or radio communication with the appropriate police department.

(d) Subsequent to an arrest the defendant shall be taken without unnecessary delay before the court that issued the order. When that court is unavailable the defendant shall be arraigned before a district justice, or in cities of the first class the municipal court, in accordance with the Rules of Criminal procedure. This section shall not be construed to in any way limit any of the other powers for emergency relief provided in this act.

As amended 1978, June 23, P.L. 513, No. 81, §1, effective in 60 days.

Rules of Civil Procedure

Under Pa.R.C.P. No. 1910.30;, 42 Pa.C.S.A, this section is not deemed suspended or affected by Rules 1910.1 et seq., relating to actions for support.

Under Pa.R.C.P. No. 1915.24, Pa.C.S.A., this section is not deemed suspended or affected by

Rules 1915.1 et seq., relating to actions for custody, partial custody and visitation of minor children.

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1. In general

Instant proceeding was one for indirect criminal contempt, where entire proceeding below had as its dominant purpose to decide if estranged husband had disobeyed order issued pursuant to Protection From Abuse Act (§10181 et seq. of this title) and, if he had, then to punish him criminally so as to preserve authority of court and to protect interests of general public, rather than to fashion a remedial order, i.e., one wherein husband could purge himself of contempt by obeying order, thus avoiding sanction. Cipolla v. Cipolla, 398, A.2d 1053, 264 Pa.Super. 53, 1979.

2. Procedure

Criminal contempt is a crime in every fundamental respect, and thus legislature has enshrouded proceeding with appropriate procedural safeguards. Cipolla v. Cipolla. 389 A.2d 1053, 264 Pa.Super. 53, 1979.

3. Double Jeopardy

The double jeopardy clause attaches to an indirect criminal contempt proceeding, and thus an adjudication, on merits, of not guilty of indirect criminal contempt is an absolute bar to appellate review. Cipolla v. Cipolla, 398 A.2d 1053, 264 Pa.Super. 53, 1979.

Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. ... JR.
CLERK

No. 85-2

In the Supreme Court of the United States

October Term, 1985

CHARLES J. ALLEN,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION INVOLVED

A. Whether the Constitutional provisions against double jeopardy prohibit criminal prosecution for simple assault, criminal trespass and rape to continue after the same actor has been found to be in contempt of a court's previous order entered under the Pennsylvania Protection From Abuse Act, when those criminal charges are based upon the same conduct or episode as the contemptuous conduct?

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COUNTER-STATEMENT OF THE CASE

This petition is based upon a decision of the Pennsylvania Supreme Court which reversed in part and affirmed in part an order of the Superior Court of Pennsylvania which in turn had reversed in part and affirmed in part the Court of Common Pleas of Lebanon County—Criminal Division which denied the defendant's omnibus pretrial motion to quash charges of simple assault, criminal trespass and rape filed against him.

The procedural history of this case begins in the Civil Division of the Lebanon County (Pennsylvania) Court of Common Pleas. On April 18, 1980, the Honorable John A. Walter, Judge entered an amicable order under the Protection From Abuse Act, 35 P.S. §10181 *et seq.*, which *inter alia*, ". . . enjoined and ordered (Charles J. Allen) to refrain from physically abusing, striking or harassing Petitioner, Julianne L. Allen, and their minor children from this time forward and for the duration of this order."

Thereafter, Mrs. Allen alleged that the defendant, Charles J. Allen, violated that protection from abuse order by forcibly entering her new residence and physically abusing her on May 7 and 8, 1980. On Friday, May 16, 1980, criminal charges of simple assault and criminal trespass were filed against the defendant. Bail was set in the amount of $1,000. On Monday, May 19, 1980 Mrs. Allen requested that the defendant be charged with con-

tempt pursuant to Section 10190 of the Protection From Abuse Act, 35 P.S. §10190. In accordance with the procedures set forth in that contempt section of the Act the defendant was brought before Judge Walter for purposes of arraignment and setting of bail. Bail was fixed at $5,000. When the defendant could not post bail, he was committed to the Lebanon County Prison. He remained there until May 28, 1980, the date set for the contempt hearing.

At the contempt hearing Mrs. Allen appeared with her attorney, Gregory Paulson, and presented testimony through herself and two other witnesses. The defendant testified on his own behalf and was represented by counsel. After the hearing Judge Walter found the defendant to be in contempt of the order of April 18, 1980. He ordered the defendant to pay the costs, a fine of $750 and discharged him from prison.

On June 3, 1980 another criminal complaint was filed against the defendant for raping his wife (see 18 Pa. C.S.A. §3103) on May 7-8, 1980, the date of the other offenses. All of the criminal charges were combined for a preliminary hearing. They were bound over for action by the Lebanon County Courts. On August 26, 1980 the defendant filed an omnibus pretrial motion to quash the information which contained the charges of simple assault, criminal trespass and rape based upon a violation of the defendant's protections under the double jeopardy clauses of the Pennsylvania and United States Constitutions. By an order and opinion dated October 8, 1980, Judge Walter, joined by President Judge G. Thomas Gates, dismissed the motion (a copy of that order and opinion is attached to Mr. Allen's petition and marked Appendix "C.")

The defendant filed a timely appeal with the Superior Court of Pennsylvania. By an order and opinion filed November 25, 1983, the Superior Court granted the defendant's requested relief regarding the simple assault charge. However, the case was remanded for trial on the charges of criminal trespass and rape. (A copy of that order and opinion, along with a dissent, is attached to Mr. Allen's petition and marked as Appendix "B.")

The defendant and the Commonwealth filed appeals in the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court reversed the Superior Court's finding that prosecution of the defendant for simple assault was barred by the double jeopardy clause of the United States and Pennsylvania Constitutions. The Supreme Court affirmed the Superior Court's decision in all other respects and remanded the case for trial regarding the charges of simple assault, criminal trespass and rape. A copy of that opinion is attached to Mr. Allen's petition and marked as Appendix "A.")

The defendant's petition for writ of certiorari followed.

ARGUMENT

A. THE CONSTITUTIONAL PROVISIONS AGAINST DOUBLE JEOPARDY DO NOT PROHIBIT A CRIMINAL PROSECUTION FOR SIMPLE ASSAULT, CRIMINAL TRESPASS AND RAPE TO CONTINUE AFTER THE SAME ACTOR HAS BEEN FOUND TO BE IN CONTEMPT OF A COURT'S PREVIOUS ORDER ENTERED UNDER THE PENNSYLVANIA PROTECTION FROM ABUSE ACT WHERE THOSE CRIMINAL CHARGES ARE BASED UPON THE SAME CONDUCT OR EPISODE AS THE CONTEMPTUOUS CONDUCT

Double Jeopardy Does Not Apply

Double jeopardy does not attach to criminal contempt proceedings relative to other criminal charges that may arise out of the same conduct. The reason for this is the clear differences between criminal contempt proceedings and Pennsylvania Crimes Code violations. Criminal offenses in Pennsylvania are based upon statutory law since common law crimes were abolished with the adoption of the Crimes Code in 1973. Unless an act is proscribed by statute, it is no longer an offense, with certain exceptions, 18 Pa. C.S.A. §107(b) and (c).

On the other hand criminal contempt, the vehicle used by the courts to enforce their orders and maintain order and dignity in the courtroom, goes back centuries

to the common law. In *Commonwealth v. Mayberry*, 459 Pa. 91, 327 A.2d 86 (1974), Mr. Justice Roberts discussed the nature of criminal contempt. He stated that criminal contempt was a crime *sui generis*, unique unto itself and that there was no need to fit criminal contempt into the mold of procedures for more commonplace offenses. In *Mayberry*, supra, the defendant was appealing a trial court's finding that he had committed five (5) acts of contemptuous behavior in the presence of the trial court.

In his opinion Mr. Justice Roberts noted that unless the penalty for criminal contempt exceeds six (6) months the contemnor has no right to a jury trial. Similarly, he has no right to a preliminary hearing, nor a right to an indictment by grand jury or information and arraignment as in criminal cases covered by the Rules of Criminal Procedure. 327 A.2d at 93. Those rules of procedure apply to the penal laws of this Commonwealth.

In *Commonwealth v. Marcone*, 487 Pa. 572, 410 A.2d 759 (1980), then Justice Nix, now Chief Justice Nix, declared that "(t)he power to punish for contempt, including the power to inflict summary punishment, is not derived by statute but rather is a right inherent in courts and is incidental to the grant of judicial power under Article 5 of our Constitution. . . ." 410 A.2d at 763. In both *Mayberry* and *Marcone*, supra, the opinion writers make references to statutes passed by the legislature regarding procedure , be employed in contempt proceedings. However, the message is clear that because of its uniqueness and integral part in the power of the courts to exercise their authority and maintain dignity, the procedures for using contempt powers are ultimately reserved for the courts.

Argument

It is against that backdrop that we must determine whether the double jeopardy clause applies to criminal contempt proceedings, and if so, to what extent.

When the double jeopardy clause is applied to situations within the legal system, it is not with a literal application. An historic review of the double jeopardy clause will show that it has not always been applied to situations which might be classified as technical double jeopardy cases.

Every time a defendant who has been convicted of a crime is successful in his appeal and wins a new trial, he is being placed in jeopardy a second time for the same offense. Nonetheless, the double jeopardy clause does not ordinarily preclude re-prosecution of that defendant whose conviction has been set aside because of trial error. *United States v. Tateo,* 377 U.S. 463, 12 L.Ed. 2d 448, 84 S.Ct. 1587 (1964). In *Commonwealth v. Potter,* 478 Pa. 251, 386 A.2d 918 (1978), Mr. Justice Pomeroy wrote that "... societal interests militate against a literalistic reading of the Double Jeopardy Clause." *Tateo,* supra, stated, "... (I)t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. ...' 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed. 2d 448, 451 (1964)."

North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 1072 (1969) held that the double jeopardy clause applies to three situations: second prosecutions after acquittal; second prosecutions after conviction and multiple punishments for the same offense. However, the

third situation also has been modified by a policy statement similar to *Tateo*. In *Missouri v. Hunter,* U.S. , 74 L.Ed. 2d 535, 103 S.Ct. 678 (1983), this Court stated that the double jeopardy clause is not violated regarding multiple punishments for the same offense or conduct if the legislative intent to impose them is clear. Thus, if the legislative intent is clear, the multiple punishments proscribed by *North Carolina v. Pearce,* supra, are constitutional. *Missouri v. Hunter,* supra, was dealing with multiple punishments in a single trial. Nonetheless, this Court has held that if there is no legislative intent regarding multiple punishments, the double jeopardy clause attaches and they are prohibited. If, however, there is a clear legislative intent to impose multiple punishments, the double jeopardy clause does not attach.

Compare the legislative intent cited in *Missouri v. Hunter* with the legislative intent clearly stated in Pennsylvania's Protection From Abuse Act in Section 10189, 35 P.S. §10189, Pet. App. "D"—15. That section states:

> "Unless otherwise indicated in this act, any proceeding under this act shall be in accordance with the Rules of Civil Procedure **and shall be in addition to any other available civil or criminal remedies.**" (Emphasis added.)

As such the Pennsylvania Legislature has expressed its intention that any type if proceeding under this Act shall be in addition to any other criminal or civil remedies. The Legislature knew of the serious nature of domestic violence and wanted to express its intent loud and clear.

Another example of when a literal application of the double jeopardy clause has been rejected is in cases deal-

ing with dual sovereigns. Where a single act constitutes a violation of the laws of both the state and federal governments, two prosecutions, convictions and sentences are constitutionally permissible. See *Abbate v. United States*, 359 U.S. 187, 3 L.Ed. 2d 729, 79 S.Ct. 666 (1959). The irrevocable nature of the source of the authority of the sovereign was a factor in cases such as *Abbate*, supra. The same could be said for the subject case. Because of the inherent power of the court to invoke contempt as a method to enforce its authority and protect its dignity, its *sui generis* nature makes it separate and distinct from the power of the legislature from whence criminal statutes arise.

As with the situations cited above, the Commonwealth submits that there are strong policy considerations to support a decision that the double jeopardy clause does not apply to criminal contempt cases. Distinct purposes are being achieved when contempt actions and criminal actions are instituted. The purpose of criminal contempt is to provide the courts with a method of enforcing its orders and maintaining its dignity while conducting its business. Contempt is to punish offenses against the court. The court is the victim and would become helpless quickly if it had no enforcement powers. On the other hand, the penal laws are established to maintain the peace and dignity of the people of the Commonwealth.

Similar to dual sovereignty between state and federal governments as noted in *Abbate*, supra, so also there is a dual sovereignty between the judicial and legislative branches. Co-equal branches of a government, yet with sources of authority and power that spring from different wells.

Another policy consideration is the danger of outrageous results. If Mr. Allen's attack upon his wife would have risen to the level of attempted murder and double jeopardy would attach if a contempt proceeding was instituted, the court would be powerless to vindicate the disobeyance of its order. For it would know that by even imposing the most minor of punishments upon such a violator of its protection from abuse order, it would destroy the ability of the Commonwealth to prosecute the serious offenses. Double jeopardy was designed to prevent harassment, not act as a loophole for defendants. Cf. *Abbate v. United States,* 359 U.S. 187, 3 L.Ed. 2d 729, 79 S.Ct. 666 (1959); *Bartkus v. Illinois,* 359 U.S. 121, 3 L.Ed. 2d 684, 79 S.Ct. 676 (1959).

In the Pennsylvania Supreme Court's opinion below it cited with approval *United States v. Mirra,* 220 F. Supp. 361 (S.D. N.Y. 1963). In that case Mirra was summarily found in contempt for throwing a chair at the prosecutor. In his subsequent prosecution for assault upon a federal office he pleaded the contempt conviction as a bar under double jeopardy. The *Mirra* court replied:

> "Let us consider by way of illustration the consequences of upholding Mirra's claim in the context of an extreme but not wholly improbable case that could have arisen after, and out of, Mirra's contempt conviction. Assume that Mirra's projectile had received more accurate a propulsion and had scored on its intended target—the United States Attorney. And assume further the grisly and morbid fact that the Assistant United States Attorney had sustained an injury which ultimately proved fatal. To sustain Mirra's claim would, in effect, grant a summary con-

temnor immunity from a homicide prosecution—an unconscionable result. Merely to state the case suffices to reveal what must preforce be the answer to Mirra's theory." Pet. App. "A"—24.

Jurisdiction of contempt cases arising out of the Protection From Abuse Act is in the civil division which handles those type of proceedings. Jurisdiction for crimes code violations lies in the criminal division. Since this type of contempt does not allow for a jury trial nor is there any right to a preliminary hearing, indictment, or information, the distinctions are obvious. See *Commonwealth v. Mayberry,* 459 Pa. 91, 327 A.2d 86 (1974).

The Commonwealth does concede that double jeopardy standards do apply to criminal contempt actions to a limited degree. In *Commonwealth v. Maurizio,* 496 Pa. 584, 437 A.2d 1195 (1981), and *Cipolla v. Cipolla,* 264 Pa. Superior Ct. 53, 398 A.2d 1053 (1979), the Pennsylvania Supreme and Superior Courts held that criminal contempts do have some of the characteristics of a criminal offense. Therefore, for purposes of appealing, a finding of not guilty of contempt the double jeopardy standard would apply and the decisions of the lower court in each case could not be appealed. The Commonwealth acknowledges that although criminal contempt is a crime *sui generis* and therefore unique unto itself it still demonstrates some of the characteristics of a commonplace offense. Cf: *Commonwealth v. Mayberry,* 459 Pa. 91, 327 A.2d 86 (1974). Therefore the application in *Maurizio,* supra, and *Cipolla,* supra, are correct. However, the Commonwealth sees that as a vertical application rather than a horizontal one. Vertical in the sense that within the contempt process an individual can only be called into

court one time for a particular contemptuous episode (unless a new hearing were ordered after appeal). This would be consistent with the unique treatment that should be afforded contempt.

The Commonwealth emphasizes that it had no control over the contempt action in this case. It arose out of a civil action under the Protection From Abuse Act, 35 P.S. §10181, *et seq.* Mrs. Allen and her attorney appeared at the contempt hearing and presented the case. The contempt action was instituted by the battered spouse, not the Commonwealth. Even if the Commonwealth were notified of the existence of these proceedings it would be powerless to intervene. Surely this type of situation is not the type of harassment by the Commonwealth designed to make a defendant run the gauntlet more than once. Double jeopardy does not attach.

Double Jeopardy—Different Elements Test

If this Court determines that the double jeopardy clause may be applied to criminal contempt proceedings, the Commonwealth submits that under the "different elements" test the charge of simple assault, criminal trespass and rape should be allowed to go to trial. In proving the contempt the elements are (1) knowledge of an order and (2) disobeyance of that order in some fashion. At the contempt hearing Julianne Allen had to prove that the defendant, Charles Allen, knew of the order. That could be done by judicial notice since the defendant agreed to the entry of the order. She also had to prove that the

defendant "physically abused, struck or harassed her on May 7 and 8, 1980," or in some other way violated the Court's order.

The test stated by this Court to determine whether or not two criminal charges violate the double jeopardy clause was announced in *Blockburger v. United States,* 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932). *Blockburger,* supra, stated:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304, 76 L.Ed. 306, 52 S.Ct. 180.

The Pennsylvania Supreme Court applied Blockburger to the charges of simple assault, criminal trespass and rape and found no double jeopardy problems.

In particular the Pennsylvania Supreme Court reviewed the case of *People v. Gray,* 69 Ill. 2d 44, 370 N.E. 2d 797 (1977), *cert. denied sub. nom. Illinois v. Gray,* 435 U.S. 1013 (1978). *People v. Gray,* supra, held that double jeopardy standards prohibited a prosecution for assault after an earlier finding of contempt based upon the same acts by the defendant, Gray. The Pennsylvania Supreme Court adopted the principles stated in the dissent.

> "We find the dissent in Gray persuasive. That dissent which is echoed in the trial court's opinion in this case, succinctly states the distinct elements of criminal contempt and the important functions which

> they serve. 'In the case at bar, . . . the contempt conviction only held that the defendant had willfully committed certain acts which violated the court order. (Footnote omitted.) The court order could have been violated by an otherwise legal act.' " Pet. App. "A" —19.

The Pennsylvania Supreme Court quotes a larger portion of the *Gray* dissent which outlines the essential differences between criminal contempt and ordinary criminal offenses. Pet. App. "A"—19-20. It places special emphasis upon the element of the willful disobedience of a court order. That could have been accomplished by harassing phone calls or entry upon the wife's property. The *Blockburger* "separate elements" test has been met, and a writ of certiorari to the Pennsylvania Supreme Court should not be entered.

A practical consideration in this case is that the legislative purpose of the Protection From Abuse Act would be totally lost if the victim of domestic violence must choose between the institution of a criminal charge and the immediate relief of contempt of a court order. The whole purpose of the Protection From Abuse Act was to provide prompt relief to victims of domestic violence since the criminal justice system, with all of the procedural requirements, was incapable of that task. That is why the remedies under the Act were to be ". . . in addition to any other available and or criminal remedies." 35 P.S. §10189. Pet. App. "D"—15.

Another practical consideration is the fact that the contempt action and the ordinary criminal charges couldn't be joined into a single prosecution even if that was de-

sired. A contempt defendant has no attending right to a preliminary hearing or trial by jury. *Commonwealth v. Mayberry,* 459 Pa. 91, 327 A.2d 86 (1974). The Petitioner makes reference to the compulsory joinder provisions of the Pennsylvania Crimes Code at Section 110, 18 Pa. C.S.A. §110, Pet. pp. 4-6. However, he conveniently ignored Section 107 of the Crimes Code which defines the application of Section 110. Section 107(c) states:

> "(c) Exceptions—This section does not affect the power of a court to declare forfeitures or to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree. . . ." 18 Pa. C.S.A. §107(c).

The legislative intent is reaffirmed that contempt is to be treated separately and distinctly. The legislature and both the Federal and Pennsylvania courts have recognized that criminal contempt contains separate elements of proof from the underlying criminal conduct. As the Pennsylvania Supreme Court determined, the *Blockburger* separate elements test has been met. No writ of certiorari to the Pennsylvania Supreme Court is appropriate.

RELIEF REQUESTED

The Commonwealth of Pennsylvania requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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